SUPREME COURT, U. S.

No. 497

AUG 15 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JOSEPHINE HANNER,

Petitioner,

v.

CECIL DEMARCUS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OCTOBER TERM, 1966

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COMES NOW your petitioner herein, Josephine Hanner, by and through her counsel, Philip M. Haggerty of the State of Arizona and a member of the bar of this Court, and respectfully petitions the Court to issue its Writ of Certiorari to the Supreme Court of the State of Arizona to review the decision of that court in the cause entitled, "BETTY JO KNIGHT et al, Appellants, v. CECIL DeMARCUS, Appellee", Cause No. 8228.

A. DECISION SOUGHT TO BE REVIEWED.

The decision sought to be reviewed is entitled, "BETTY JO KNIGHT, et al v. CECIL DeMARCUS", No. 8228, Supreme Court, State of Arizona. It is reported at 102 Ariz....., 425 P.2d 837. The text of the opinion is reproduced as Appendix A hereof.

B. GROUNDS UPON WHICH REVIEW IS SOUGHT.

1. The opinion of the Supreme Court of Arizona was rendered on March 29, 1967.

2. Petitioner's motion for rehearing was denied on May 23, 1967.

3. The jurisdiction of this Court is founded on 28 U.S.C. 1257 (3).

C. QUESTIONS PRESENTED FOR REVIEW.

I

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States for a state court to approve and enforce a procedure by which an officer of the court, to wit, a special master appointed by the court, may execute upon the property of a party appearing before him and purchase said property at execution sale without actual notice to the party-property owner of either intention to execute, execution, or sale?

II

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States to approve and enforce a law by which such an officer of the court and special

master may retain the benefit of ownership of such property by an execution sale, where the evidence of the real value of that property, which evidence was obtained by said special master in the performance of his official duties, shows the property to be worth between four and eight times the amount awarded said special master as his compensation?

III

Where a judgment creditor who is an officer of the court is aware of personal property sufficient in value to satisfy his judgment against a party, and he fails to inform the levying officer of such property and directs specific execution against a certain piece of real property; and the levying officer makes no attempt to locate personal property or to inquire of the debtor which real property should be levied on, all in violation of the clear terms of the statutes relating to executions, is not such a violation of the statutes by two officers of the court, without notice to the debtor, a violation of the traditional notions of due process and fair play in contravention of Article 1 of Amendment XIV, Constitution of the United States?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Constitution of the United States

Section 1, Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

Statutes

Arizona Revised Statutes

ARS 12-1552: "A. Executions are either general or special.

1. A general execution is one which commands the officer to whom it is addressed to make the amount of the judg-

ment out of property of the judgment debtor without specifying the particular property.

2. A special execution is one which commands the officer to whom it is addressed to sell certain specific property, or to deliver certain real or personal property to the party adjudged to be entitled thereto:"

. . . .

ARS 12-1553:

"A general execution shall state the amount of the judgment and costs and the amount due thereon, and shall require the officer:

1. If the execution is against the property of the judgment debtor, to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, then out of his real property."

. . . .

ARS 12-1562:

"A. An officer shall execute a general execution against the property of a judgment debtor by levying on a sufficient amount of property, if there is a sufficient amount of such property, and collecting or selling the things in action and selling the other property and paying to the judgment creditor or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and costs shall be returned to the judgment debtor unless otherwise directed by an order of the court.

B. A judgment debtor may point out to the levying officer the property he desires to be levied on, and if the officer deems it sufficient to satisfy the execution, he shall make levy on no other property."

. . . .

Rules of Procedure

Rule 53, Arizona Rules of Civil Procedure

Federal Rules of Civil Procedure:

"53(a) Appointment and compensation. . . . As used in these Rules, the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such other parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation, but when the party ordered

to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

E. STATEMENT OF THE FACTS.

This case originated as a quiet title action involving certain land in Maricopa County, Arizona. The land was owned by petitioner, Josephine Hanner, and the action was brought by Cecil DeMarcus, respondent herein, against her, her daughter, Betty Jo Knight, and two other persons claiming lien interests in the land. Summary judgment was entered against all defendants. The matter was appealed to the Supreme Court of the State of Arizona, and the judgment of the trial court was affirmed. This petition is brought by Josephine Hanner only.

The quiet title action was an attempt by respondent, DeMarcus, to judicially establish his right to the land. His claim was based on a sheriff's deed, issued as a result of an execution and sale in which DeMarcus was the judgment creditor and purchaser.

Respondent is a certified public accountant who had been appointed as a Special Master of the Maricopa County Superior Court in a divorce action between the petitioner and her former husband; all pursuant to Rule 53, Arizona Rules of Civil Procedure. At the conclusion of the lower court divorce proceedings, DeMarcus was awarded as his fee the sum of $5,072.10, the full amount being charged to Mrs. Hanner. This judgment, Cause No. D-49044, Maricopa County Superior Court, was appealed to the Supreme Court of Arizona alleging as error, *inter alia,* the propriety of charging the entire master's fee to Mrs. Hanner. It was affirmed in all respects; *Hanner v. Hanner,* 95 Ariz. 191, 388 P. 2d 239. No issue is now taken with the decree of divorce, the amount of the master's fee, or the taxation of the fee to Mrs. Hanner.

The Special Master's fee was set in June of 1959. Although the taxing of the fee solely to Mrs. Hanner was appealed, no supersedeas bond was filed. In September of 1959, DeMarcus secured a general execution against the property in question,

which at that time was in the undisputed ownership of Mrs. Hanner. The sale at execution was held in October of 1959, and the property was purchased by the Special Master for the amount of his judgment. In April of 1962, a sheriff's deed was issued to DeMarcus, and on November 17, 1962, the action to quiet title was commenced in accordance with Arizona procedure by the tender of $5.00 to Mrs. Hanner with a demand that she execute a quit-claim deed to the property. The tender and demand were refused, and this action in quiet title followed.

Cecil DeMarcus, as Special Master, with the responsibility of ascertaining the property of Mr. and Mrs. Hanner and determining its status, or assisting the court to determine its status, as separate or community property, had access to all records concerning the property and knowledge of its value, status, location, and nature. He was acquainted with Mrs. Hanner, examined all her books and records, and discussed the matter with her, and even had some statements taken on deposition. He knew her then counsel, Mr. John Levy, occupying space in the same office building, and in fact even on the same floor as Mr. Levy until November of 1961. He had many conversations with Mr. Levy before and after the decree. No mention was made at any time of an execution to collect his fee, and the first notice to Mrs. Hanner of any claim by DeMarcus to the property was the tender of $5.00 and presentation of the quit-claim deed, in November of 1962. The office of the Sheriff of Maricopa County never communicated with Mrs. Hanner at any time in this matter. Evidence before the Special Master, which evidence was incorporated in his Master's report to the court, showed the land levied upon to be worth at least $20,000. Mrs. Hanner had claimed that it was worth in excess of $40,000. His records as Special Master also showed personal property of a value in excess of $12,000. No attempt was made to levy on this personal property, and no attempt was made by the Sheriff to have Mrs. Hanner point out property which she desired to be levied on. The quiet title action was decided in all respects in favor of Special Master DeMarcus and affirmed on appeal.

F. QUESTIONS OF CONSTITUTIONAL LAW WERE RAISED PRIOR TO THIS PETITION.

The issue of the failure of notice was raised by this petitioner's answer in the Superior Court-quiet title action, and the response to a motion for summary judgment. It was also specifically related to the Constitution of the United States in a motion for new trial filed in the same court. (Abstract of Record, Knight v. DeMarcus, No. 8228, pp. 11, 66, 76, 94-95). Constitutional issues were again specifically raised in the brief on appeal to the Supreme Court of the State of Arizona. (Assignment of Error No. VIII, pp. 22-23, Appellants' Opening Brief). The same issue was also raised and argued in Appellants' Motion for Rehearing before the Supreme Court of Arizona. (Motion for Reheating, pp. 10-11)

No opinion was written in the lower court, and neither the entry of summary judgment, the denial of the motion for new trial, nor the judgment recites argument or reason for the judgment beyond the bare formalities. In the Supreme Court opinion, the argument is treated in one sentence:

> "We disagree with defendants' contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or federal constitutions."

The order denying rehearing is merely that, and there is no elaboration.

H. ARGUMENT

Summary

The plea of Josephine Hanner is simple and clear.

> "Mr. DeMarcus is an officer of the court and almost a judge, he should have told me. As an officer of the court; he should not be allowed to make a tremendous profit on his Master's fee. As an officer of the court, he above all should follow the law. As an officer of the court, he should not use his inside information to make a profit and seriously injure one of the parties appearing before him."

The law demands that personal property be seized before real property be seized. (A.R.S. 12-1553 (1)) The law gave her

a right to point out and to select property to be levied upon. A.R.S. 12-1562(B)) The law states that Special Master is entitled to his fee, but not entitled to anything more than that. A litigant in a case expects and has a right to believe that he or she will be treated fairly by the court before which they appear.

But statutes were ignored, no notice was provided, and the Special Master, acting as an arm of the court and the alter ego of the trial judge, used his knowledge of the case and the parties before him to acquire valuable property far in excess of the value of his fees for a fraction of its worth. The whole affair shows not only an absence of equity, but a deliberate, calculated, and awesomely successful effort to deprive petitioner of her rights and is an affront to the traditional notions of due process and essential fair play heretofore so admirably protected by this Court.

We realize that the amount of the value of the land involved is not spectacular, but we believe there are issues which especially commend this case to the attention of the Court.

The parties are not just private litigants. The respondent was acting as a branch of the judicial arm of the government. The abuse of official power, especially judicial power, for private gain calls with special fervor for equitable redress by the very courts which created the power. Of equal importance is our prayer that notice be given when one's property is placed in jeopardy, and that statutes providing for the protection of debtors be followed so that the protection be meaningful and realistic. This element of notice has long been held by this Court to be an essential part of due process.

Of additional weight to support an acceptance of this matter is the fact that remedies of Special Masters in Arizona are an exact duplicate of those provided in federal law and in many states. There are few, if any, cases touching on this subject at all, and none since the Federal Rules of Civil Procedure have replaced the Equity Rules.

An Equity Master May Not Execute on the Property of Parties Appearing Before Him Without Notice.

A Master at Equity occupies a traditional position of long standing in courts of equity. Although the office has been abolished in some jurisdictions (*Killingstad v. Meigs*, 147 Wis. 511, 133 N.W. 632), many states have determined that their function can be useful and necessary in certain areas traditionally related to equity. The federal court system has likewise continued the use of masters. While a Special Master may not be said to sit upon the woolsack, he certainly acts under the aegis of the chancellor. As this Court has previously held:

> "He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended; . . . The rights of those who ultimately pay must be carefully protected." *Newton v. Consolidated Gas Company of New York*, 259 U.S. 101 (1922)

See also *In re Gilbert*, 276 U.S. 6 (1928), to the effect that he has "the duties and obligations of a judicial officer".

And from lower federal courts, we find that "he should be a person fit to perform the duties incumbent upon one sitting in the place of the court". *Finance Committee v. Warren*, 82 Fed. 525 (7th Cir. 1897).

> "A Master is a public servant engaged in a public function. He is an aide to the court of his appointment. He is not a servant of the litigants or a servant of their attorneys." *Universal Oil Products Co. v. Hall*, 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621.

We find these dictates a little difficult to coincide with the activities of DeMarcus in this particular matter. His own report filed in the original divorce action, Maricopa County Superior Court No. D-49044, Exhibit A, shows a detailed analysis of the property owned by Mr. and Mrs. Hanner. The deposition of DeMarcus taken in the quiet title action, quoted in part in the motion for rehearing, shows that he communicated with Mrs. Hanner and with her attorney both before and after the judgment, and that he did not mention the execution because, "Oh, I

didn't want to get into any arguments over anything as to whether I should or should not do it". (Motion for Rehearing, p. 7).

His own report (Exhibit A) sets the value of the property in question at $20,000. There can be no doubt of the fact that DeMarcus could easily have informed Mrs. Hanner of the steps he was taking. He knew her attorney, her address, all the property she owned, in fact, far more than would be normal for an ordinary judgment creditor.

We realize it has been generally held, and with good reason, that where notice of an action was originally given, and a party has had his day in court, no special notice is required in supplementary proceedings to enforce a judgment obtained in the action. *Endicott-Johnson Corp. v. Encyclopedia Press,* 266 U.S. 285 (1924). However, that situation is inapplicable here for two basic reasons.

In the first instance, DeMarcus was not a "party" to the action for which he recovered a judgment. As a non-party to an action and, in fact, as one who had special duties of responsibility and fairness towards all of the parties in the action, we believe that fundamental concepts of fair play and equity demand that notice be given to a party before a Special Master executes against the property of that person.

In the second instance, there is considerable doubt as to whether the right of a Special Master under either Arizona Rule 53(a) or Federal Rule 53(a) to collect whatever fee may be awarded him can be directed against the property of a party involved, rather than against the party himself. The Rule specifically states that a Special Master may have "execution against the delinquent *party*". (Emphasis added) Nothing is mentioned about an execution against the *property* of the party. The use of the word "party" would imply notice to the person, as one may not execute against the person without actually having him brought before the court.

The present Rule 53 is an adoption in part from Equity Rule 68.

"It seemed best to the committee to make no startling changes in the existing practice, [as to reference] so the subject is

covered by a single rule which merely attempts to clear up some of the most important obscurities that now exist." 28 *Va.L.Rev.* 261.

The previous rule, Equity Rule 68, read in part: "attachment for the amount against the party."

The one explanation of this rule which is found in our body of federal jurisprudence appears to be *Cutting v. Van Fleet,* 252 Fed. 100 (9th Cir. 1900). There the court held that the remedy was by contempt proceedings, and that an order to show cause need not be issued before the party be found in contempt. In explaining the nature of the rule, the court held as follows:

"The answer to the appellant's contention is that the order here made is not for the benefit of a party to the suit, and is not of the character of a judgment or decree for the payment of money, or a debt found due to the master. The proceeding is in contempt for refusal to obey an order of the court. The obligation to pay does not arise out of contract. It rests solely upon the order of the court. It operates upon the appellant in personam. Samel v. Dodd, 142 Fed. 68, 73 CCA 254; Meeks v. State, 80 Ark. 579, 98 S.W. 378; Wightman v. Wightman, 45 Ill. 167; Carlton v. Carlton, 44 Ga. 215. Rule 68 has taken away the right of the master to hold his report until payment of his compensation and has given him in lieu thereof the right to the remedy of attachment."

The court then went on to hold that this did not constitute imprisonment for debt, as contempt of court was never held to be a deprivation of this constitutional protection.

Thus, the only change we have between the old Equity Rules and the present rule is a substitution of the word "execution" for "attachment". The phrase still is that either remedy is directed against "the party", not against any property of the party involved.

Proceedings in contempt, like all equity proceedings, are in personam, and may not be enforced without actually bringing the delinquent party before the court, in order to impose punishment for contempt. *Holt v. Virginia,* 381 U.S. 131 (1965); *In re Oliver,* 333 U.S. 257 (1948).

Since the Advisory Committee apparently intended no drastic changes or substantial changes in the old Equity Rules, but merely

attempted to correlate them into a better legislative pattern, we believe we can assume that the present rule is merely an extension of the old Equity Rule and that the remedy of a master who was not paid was to cite the party for contempt of court and execute upon his person.

If the promulgators of the Federal Rules wished to imply that the remedy was to be taken against the property of the debtor, it would have been a matter of the greatest simplicity to place the word "property" in the statute. But they left in the phrase "against the delinquent party".

The only conclusion which can be drawn is that those who recommended the rules and adopted them wish to continue the remedy to be a personal remedy against the delinquent party individually. Equity has always traditionally acted in personam, and this would be totally in accord with normal equitable practice.

The importance of this distinction lies in the fact that an action directed against a party for contempt would provide him with actual notice of the proceedings against him. Here there was no such actual notice. While it may be true that notices were posted on the bulletin boards outside the courthouse, and perhaps run by way of legal advertisement in the weekly newspaper devoted to such advertising, this would hardly constitute real or actual notice to the parties involved, within the meaning of *Holt* or *Oliver, supra.*

The law relating to the method by which a Special Master may secure his compensation has been set forth by the only federal court to consider the matter, *Cutting v. Van Fleet, supra,* to mean enforcement by contempt proceedings where there is actual notice to the alleged delinquent party. The relationship of a Special Master to the parties before him is a special relationship, and not one of merely an ordinary judgment creditor against a judgment debtor. The Special Master here deliberately avoided mentioning or giving any notice to Mrs. Hanner of his intention to seize her property. DeMarcus completely flouted the requirements of this Court that, as a Special Master, he holds "a position of honor, responsibility and trust".

The use of his position to effectuate a substantial private gain cannot, under any notions of due process, be tolerated.

The Seizure of Property in Excess of his Judgment Amounts to a Taking of Property Without Due Process.

While Mrs. Hanner contends that the property in question is worth approximately $40,000, we will content ourselves with the Special Master's report to the effect that it was worth $20,000. This report is quite extensive and shows a detailed analysis of all the property owned by Mrs. Hanner. (No. D-49044, Ex. A)

All of this information was obtained by DeMarcus in the performance of his official duties as a Special Master. This involved a detailed analysis of all the books and records kept by Mrs. Hanner concerning interests in a number of pieces of property, with a further analysis of the encumbrances which might be on each of them. While we do not doubt the fairness of his fee in the amount of $5,000, our conscience is shocked by the fact that he turned this $5,000 judgment into a $20,000 piece of property.

This Court in *Newton v. Consolidated Gas Co. of New York*, 259 U.S. 101, (1922) discussed, as other courts have discussed, the determination of the compensation of a Special Master. It also noted, as we have stated above, that "the rights of those who ultimately pay must be carefully protected". We fail to understand how the Supreme Court of Arizona can hold that $15,000 over and above the award constitutes careful protection of the parties involved. It is so gross as to shock the conscience of the Court. "His compensation should be liberal but not exorbitant." *Newton, supra.*

The Supreme Court of Arizona passed over the matter with a brief reference to the fact that Mrs. Hanner could have redeemed the property in accordance with the laws relating to redemptions by judgment debtors from execution sales. However, as we pointed out before, Mrs. Hanner had no notice of the execution or sale or issuance of the deed until long past the six months period of redemption.* If she had no notice, pray tell, how could she have redeemed the property?

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*A.R.S. 12-1281

As we will point out in our third argument, we do not believe that the laws of the State of Arizona allow property to be seized without notice, under a writ of general execution. But we believe in this instance the Supreme Court allowed the enforcement of the law in such a way that gross inequity has been done to Mrs. Hanner, and that such a judicial interpretation constitutes an enforcement of the law whereby she was deprived of property without due process.

Such an underhanded use of his official knowledge and position by the Special Master is fortunately not common, as we have few cases on this subject. We have one possible parallel. In *Universal Oil Products Co. v. Hall*, 76 F.2d 258 (8th Cir. 1935), cert. denied 296 U.S. 621, while the master in that particular case was guilty of more than one act properly condemned, one of the factors called to the attention of the court which resulted in its ordering a refund of fees paid was the fact that the master in a patent proceedings of a somewhat complicated nature involving the oil cracking process, filed in his own name an application for patent in the same field, obviously using the information learned by him in the course of the litigation.

The true authority of courts is based largely upon the respect the litigants have for them and the trust they have that disputes will be fairly heard and judged. When an officer of the court uses his knowledge, authority, and position to effectuate a substantial personal gain for himself, all courts suffer, and the fabric of our social structure has received another damaging tear.

Where Laws Specifically Designed to Protect Judgment Debtors are not Followed and Are In Fact Evaded or Violated, a Judgment Debtor Who Loses Property Has Lost It Through a Violation of Due Process of Law.

We have set forth hereinabove the Arizona statutes relative to executions and sales. The law requires, and the writ itself sets forth the fact, that personal property must be seized before real property. The report of the Special Master shows personal property assets of Mrs. Hanner in excess of $12,000. He not only knew of these assets, but their nature and location.

The Supreme Court of Arizona in an earlier decision involving the same statute held the following:

> "But when there is no one concerned other than the parties to the judgment, the execution, and the sale, and the motion to vacate is made within a reasonable time, the sale may be set aside where it is shown that the judgment debtor had sufficient personal property which could have been applied on the judgment, and that the officer knew it, or by the exercise of reasonable diligence could have discovered it, and failed to levy upon it, but instead levied upon and sold for the amount of the judgment real property worth many times said sum." *Blasingame v. Wallace*, 32 Ariz. 582, 61 Pac. 42 (1927), at 32 Ariz. 586.

Here, obviously, the Sheriff did not use "reasonable diligence", because if he had merely inquired of the judgment creditor the existence of personal property was known to this creditor, and could have been disclosed. In any event, our principal action is against the creditor himself, and he withheld the information from the Sheriff or failed to notify him of the personal property. We do not believe DeMarcus can now claim the advantage of his own silence in an area in which he was well informed.

Beyond this, even if there were only real property available, Mrs. Hanner had the right under ARS 12-1562(B), *supra*, to point out to the levying officer the property she desired to be levied upon. This statute clearly implies actual notice to the parties against whom the judgment runs, because, if they do not know about it, how can they point it out to the Sheriff? The Supreme Court of Arizona made light of this argument and the argument that personal property must be seized prior to real property by holding in a rather casual manner the following:

> "In the first place, it was reasonable for the plaintiff to assume that the property in question was the only suitable separate property of Josephine Hanner upon which to execute and that it was naturally preferable to execute against it as opposed to property she held in community."

It held this in the face of the fact that the very judgment which gave DeMarcus his fee also divided the property into the separate property of each of the parties involved and stated which prop-

erty was separate and which property was community property. In essence, all the property, except an apartment house and a horse, were held to be the separate property of Josephine Hanner, and, if Mr. DeMarcus could read the judgment to determine his fee, he could read the judgment to determine which property was her separate property.

The requirements of the Arizona statute relative to the seizure of personal property first before real property is seized and the requirements that the debtor be afforded an opportunity to point out his property have been part of our statutes for many years. They were specifically recognized and enforced in *Blasingame v. Wallace, supra,* and even more recently recognized and approved in *Mortensen v. Berzell Investments Co.,* 2 Ariz. App. 571, 410 P.2d 689 (1966), where the Sheriff evidently personally contacted the judgment debtor and the judgment debtor was held to have failed to reveal personal property.

But in our case the Arizona Supreme Court evidently lost sight of the wisdom and equity of its position of forty years ago. The requirements of the statutes, the purposes behind them, and its own earlier language upon which Mrs. Hanner and her counsel had a right to rely were completely overlooked and ignored. The net result was a substantial loss of property without notice, and a substantial enrichment of an officer of the court who had a duty to protect all the parties before him.

CONCLUSION

It is respectfully submitted that such an act or activity cannot be tolerated, and that the decision of the Arizona Supreme Court requires reversal as constituting judicial approval of the seizure of the property of the petitioner herein without due process of law and in contravention of the Fourteenth Article of Amendment of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

IN THE

Supreme Court of the State of Arizona

In Division

BETTY JO KNIGHT, et al, Appellants, CECIL DEMARCUS, et ux, Appellees.	No. 8228

Appeal from the Superior Court of Maricopa County
Honorable Jack D. H. Hays, Judge
Affirmed.

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VANLANDINGHAM, STONEMAN & LYNN, Phoenix,
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BERNSTEIN, Chief Justice

Plaintiff, Cecil DeMarcus, brought a quiet title action in the Superior Court of Maricopa County. From an order granting plaintiff a summary judgment, defendants appeal.

Cecil DeMarcus acted as special master in a divorce action involving appellant Josephine Hanner, Superior Court case No. 49044, and was awarded a fee of $5,072.10 for his services. Rule 53(a), Rules of Civil Procedure, A.R.S. 16. This award was subsequently affirmed by this court in Hanner v. Hanner, 95 Ariz. 191, 388 P.2d 239,[1] in which we held that the trial

[1]This decision not being rendered until after the quiet title action had been brought in the Superior Court. (Footnote in the original)

court was properly acting within its discretion in ordering Josephine Hanner, defendant both in the divorce action and the present quiet title action, to pay the master's fee.

The fee had been set by the lower court in June 1959, but remained unpaid in September of the same year when the plaintiff, DeMarcus, secured an execution against the property presently in question. A sale following the execution was made in October and the property was purchased by the plaintiff for a price approximately equal to the judgment.

In April of 1962 a sheriff's deed was issued to DeMarcus, and it is on the basis of this deed that he now seeks to quiet title in the described property. The named defendants are Josephine Hanner, Betty Jo Knight (daughter of Josehpine Hanner) and two creditors, Glenn Nesbitt and Gladys Barnd who claim a lien interest in the land. On plaintiff's motion, the trial court granted him a summary judgment and subsequently denied the defendants' motion for a new trial.

Rule 56(e), Rules of Civil Procedure, A.R.S. 16 provides that once a motion for summary judgment has been made and supported, the adverse party must answer in detail as specific as that of the moving papers or else summary judgment will be entered against him. Because plaintiff's deposition and affidavits presented a prima facie case for quiet title (infra), Lujan v. MacMurtrie, 94 Ariz. 273, 383 P.2d 187, and because defendants Nesbitt and Barnd failed to answer with opposing affidavits, we conclude that summary judgment was properly entered against them. We turn now to a consideration of the summary judgment granted against defendants Josephine Hanner and Betty Jo Knight.

Summary judgment may be properly granted when, one, the pleadings, depositions, and affidavits present no genuine issue as to any material fact and, two, the moving party is entitled to a judgment as a matter of law. Rule 56(c), Rules of Civil Procedure, A.R.S. 16. Defendants present several reasons why they think summary judgment was improvidently granted in the present case, these being discussed below.

First, defendants contend that plaintiff's affidavit was defective

because it fails to state it was made upon his personal knowledge and because neither the affidavit nor the attached exhibits were sworn to or certified. We have previously held that when, as here, the contents of an affidavit show that its material parts are statements of the affiant's personal knowledge, it is unnecessary to specifically state that the statements therein are a part of the affiant's personal knowledge. Hoffer v. Wetzel, 95 Ariz. 384, 390 P.2d 911.

Likewise we held in Hoffer v. Wetzel, supra, that failure to certify or swear to exhibits or affidavits is not a jurisdictional defect and that an objection in this respect may be waived. Since no objection for failure to comply with this required formality was raised while the lower court was considering the motion for summary judgment, we deem the objection to have been waived. Moreover, it would be purposeless, under the circumstances, to send the case back to the trial court for the sole purpose of having plaintiff correct the errors in his affidavit. See Colby v. Bank of Douglas, 91 Ariz. 85, 370 P.2d 56.

Secondly, defendants contend that there were several issues of fact that should properly have prevented the summary judgment. First of these issues advanced by the defendants is whether the plaintiff had given defendants "notice" of his intention to execute on the property in question. They argue that Rule 53(a), Rules of Civil Procedure, A.S.R. 16 imposes such a notice requirement. We disagree. The pertinent portion of that rule is as follows:

> ". . . (W)hen the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

A cursory reading of the rule makes it evident that the word "notice" refers to a notice to the debtor of his obligation and that the rule does not then further require a notice of an intent to execute, once notification of the judgment is properly given. Therefore whether or not defendants had notice of the intended execution is immaterial and does not stand in the way of a summary judgment. Maloy v. Taylor, 86 Ariz. 356, 346 P.2d 1086.

Defendants further contend that the question of whether the property executed was held in joint tenancy between defendants Josephine Hanner and Betty Jo Knight, was a material issue of fact. This matter could be material only to Betty Jo Knight who was not a party to the Hanner v. Hanner action, supra, and she specifically disclaimed, under oath, any interest in the property. The following is taken from the Supplemental Abstract of Record:

"Q. Do you have a claim or did you ever claim any interest in those lots?

"A. (Betty Jo Knight): No, sir."

In addition the following comes from an examination of Josephine Hanner:

"Q. Mrs. Hanner, your daughter testified she has no interest in those lots, isn't that correct?

"A. You mean that she bought the interest, or something of that sort?

"Q. You heard her testimony that she had no interest in that property described in that Exhibit?

"A. She would if I died; they would belong to her.

"Q. But at the moment as far as you are concerned and she is concerned - -

"A. They are mine, my lots."

Rule 53(a), supra, providing for the appointment and compensation of special masters is clear in its terms. If the compensation is not paid, the rule provides a means by which payment may be secured. We disagree with defendant's contention that this method is either vague or lacking in the protections guaranteed by the due process clauses of either the Arizona or Federal Constitutions.

Neither do we agree with defendants' claim that such compensation is in the nature of "costs" and that payment thereof should be suspended pending appeal. If the defendants wished to stay execution of the judgment rendered against Josephine Hanner, pending appeal, this could easily have been accomplished by filing a supersedeas bond in accordance with Rules 62(d) and

73(k), Rules of Civil Procedure, A.R.S. 16. This, however, was not done.

We conclude that the plaintiff acted entirely within his rights as prescribed by statute. He was awarded a reasonable compensation for his services and was not paid. As a result, he sought relief in a manner provided by statute for persons in his exact position. Similarly, we conclude under the circumstances, contrary to defendants' urgings, that the plaintiff did not act adversely to notions of equity in executing against the particular property in question, despite indications that it was worth considerably more than the judgment. In the first place, it was reasonable for the plaintiff to assume that the property in question was the only suitable separate property of Josephine Hanner upon which to execute and that it was naturally preferable to execute against it as opposed to property she held in community. In the second place, defendant was nevertheless free, for a period of six months, to exercise her statutory equity of redemption as a means of preserving her interest in the property. A.R.S. §§12-1281 — 12-1289. Again, defendant neglected to use the appropriate remedy.

Judgment affirmed.

CHARLES C. BERNSTEIN, Chief Justice

CONCURRING:

ERNEST W. MCFARLAND, Vice Chief Justice

JESSE A. UDALL, Justice